No. 92-2000 (2)

Supreme Court, U.S.
FILED
JUN 16 1993
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1992

WILLIAM A. HOUCK,

*Petitioner,*

-v-

WAYNE T. STEPHENS, JOSEPH DADDONA and CITY OF ALLENTOWN,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Third Circuit err as a matter of law in affirming the trial court's order of summary judgment in favor of the respondents where the petitioner failed to establish that there is a genuine issue of material fact for trial?

## TABLE OF CONTENTS

*Page*

Question Presented for Review ..... i

Table of Contents ..... ii

Table of Citations ..... ii

Statement of the Case ..... 1

Summary of Argument ..... 6

Reasons for Denying the Writ ..... 6

I. Houck has not established any special or important reasons for this Court to exercise its discretionary review. ..... 6

II. Houck failed to produce any evidence showing that there is a genuine issue for trial. ..... 7

Conclusion ..... 12

## TABLE OF CITATIONS

**Cases Cited:**

*Firemen's Insurance Company of Newark, N.J. v. DuFresne*, 676 F.2d 965 (3d Cir. 1982) ..... 8

*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 546, 58 S. Ct. 851 (1938) ..... 7

*Grier v. Galinac*, 745 F. Supp. 1058 (M.D. Pa. 1990) .... 8

*Contents*

*Page*

**United States Constitution Cited:**

First Amendment ..... 1

**Rule Cited:**

Federal Rule of Civil Procedure 56(e) ..... 6, 7, 8

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## RESPONDENTS' BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

Joseph Daddona ("Daddona") is the Mayor of the City of Allentown. Wayne T. Stephens ("Stephens") is the City's Police Chief. William A. Houck ("Houck") is a patrolman on the City's police force. In his second amended complaint, Houck alleges that his First Amendment rights were violated by Stephens, Daddona and the City when Houck was not given a promotion to the position of sergeant in retaliation for exercising his First Amendment right to freedom of speech.

Under the Third-Class City Code and under the ordinances of the City of Allentown, Daddona, as Mayor, possesses full and final authority concerning decisions and policies regarding promotions within the Allentown Police Department. The procedure for selecting a candidate for promotion within the Allentown Police Department in January, 1990, was that the department would conduct tests and evaluations of all candidates and make a recommendation to Daddona of those persons to be promoted. Daddona would then make the final decision. Daddona was not bound to accept the department's recommendation of a candidate for a promotion.

The procedure of the Allentown Police Department for conducting tests and evaluations of the candidates for promotion is set forth in the Police Department General Order 309. General Order 309 was written before Stephens became Chief of Police and was accepted by the Fraternal Order of Police ("FOP"). General Order 309 did not take effect until 1990. General Order 309 provides a four-part process for the promotion procedure consisting of: a written examination, seniority, a department evaluation and an oral interview.

General Order 309 provides that the initial step in the procedure is a written examination with a minimum passing grade of 70%. Stephens did not select the written examination or administer the test.

General Order 309 provides that candidates who have not passed the written test are not eligible for further participation in the promotion selection process. However, General Order 309 further provides that a different minimum passing grade may be adopted if problems of establishing a meaningful eligibility list warrant it. In 1990 none of the candidates for promotion to sergeant, including Houck, received the passing grade of 70%.

Because no one had passed the written examination for sergeant, Stephens, FOP President Paul Snyder, FOP Solicitor Aaron Matte, Assistant Police Chief Gerald Monahan and Deputy Police Chief Harold Boyer held a meeting to discuss the procedure to be followed. The decision agreed to at that meeting was that the average score of all the candidates would be the passing grade.

During the same meeting, the departmental evaluation (also referred to by the parties and the lower courts as the written evaluation) portion of the promotion procedure was also modified. General Order 309 provided that the candidates were to be evaluated by the Chief of Police, one Assistant Chief of Police, two Captains, and the candidate's primary supervisor. The final score would be the average of the remaining three evaluations once the high and lower evaluations were excluded. This procedure was modified at the request of the FOP and by agreement by those at the meeting because different shift lieutenants (a candidate's primary supervisor) did not rate their patrolmen on the same basis. The departmental evaluation procedure utilized after the change was that Assistant Chief Monahan, Deputy Chief Boyer, Chief Stephens and Captain Warmkessel reviewed the yearly performance evaluations of the candidates from the previous three years and the evaluations from the platoon and arrived at a consensus number to be given to each candidate.

The oral interview part of the promotion process was also changed at the meeting. Instead of giving a candidate a rating on a score of zero to one hundred and then multiplying that number by 15% as provided in the General Order 309, a candidate was merely given a score from zero to fifteen. Otherwise the oral interview part of the promotion process remained the same.

Therefore, the procedure followed in January, 1990, for recommending candidates to the Mayor for a promotion was a four-part process:

1. A written examination was prepared by and graded by an outside testing agency. This accounted for 65% of a candidate's rating.

2. Seniority accounted for 5% of the candidate's rating.

3. An oral interview accounted for 15%. This was conducted by five persons, including a civilian employee of the City of Allentown and the Chief of Police from the City of Bethlehem, each of whom voted separately, with the high and low scores discarded.

4. A department evaluation accounted for 15%. This involved an evaluation of a candidate's work performance by four of the top-ranking officers of the police department.

Houck applied for a promotion with the Allentown Police Department in January, 1990. Although Houck, along with the other applicants, failed to achieve a passing score on the written exam, he had the highest score of those who took the exam. Houck also received the maximum five points for his seniority with the department. However, Houck fared poorly in the oral interview and received only two out of fifteen points on the department evaluation portion of the promotion process. The sum of all the components to the promotion process — the written test, the oral interview, the departmental evaluation and seniority — placed Houck last on the promotion list. The net result was that of the 28 applicants, 14 of whom were deemed eligible for promotion by reason of their performance on the written examination, Houck was 14th. Thus, when vacancies occurred in 1990 and 1991 for sergeants, the Allentown Police Department did not recommend Houck for promotion to this position. Nor did Mayor Daddona promote him.

Houck claims that he circulated a petition in 1984 protesting

Stephens' promotion to Captain at that time. Daddona was not aware of this incident until after the filing of this lawsuit.

Houck testified in a deposition in 1985 in federal court litigation involving the demotion of certain Allentown police officers. His deposition testimony was critical of Stephens, but favored the position of Mayor Daddona and the City of Allentown in that litigation.

Houck admitted in his deposition that he had never communicated any complaint to the Mayor about promotions in the Police Department. Mayor Daddona first became aware of a complaint when Houck's counsel directed a letter to him on February 17, 1990. This letter does not contain any reference whatsoever to the 1984 incident in which Houck allegedly protested the promotion of Stephens to Captain. The record is devoid of any evidence that Daddona was even aware of this incident. The letter does claim that Stephens was retaliating against Houck for testimony given by Houck in a previous deposition. However, Houck's deposition testimony *favored* Daddona's position in that earlier case.

Following receipt of the February 17, 1990 letter, Daddona asked the City Solicitor to look into the matter. The City Solicitor did so, and reported to Daddona that in his opinion there was no impropriety in connection with the promotion procedure. He also reported to Daddona that Houck had the second highest number of sick days in the Allentown Police Department and that Houck had received numerous reprimands for misconduct, including seven accidents with his cruiser car, interfering with an investigation requested by the District Attorney, making racist comments, and refusing to investigate a knifing.

## SUMMARY OF ARGUMENT

This case does not present any issues appropriate for exercise of this Court's discretionary jurisdictional powers. The decision of the Court of Appeals of the Third Circuit affirming the district court's entry of summary judgment in favor of the respondents does not conflict with a decision of any other court of appeals. Rather, the decision is consistent with other case law and is in accord with Rule 56(e) of the Federal Rules of Civil Procedure.

Petitioner has not produced any competent evidence that there is a genuine issue of material fact for trial, as required by Rule 56(e). Respondents are entitled to judgment in their favor based upon the evidence which they produced, and the award of summary judgment in their favor is therefore proper.

## REASONS FOR DENYING THE WRIT

### I.

### HOUCK HAS NOT ESTABLISHED ANY SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY REVIEW.

The decision of the Court of Appeals for the Third Circuit in this case does not conflict with the decision of any other court of appeals. This case merely concerns whether Houck has complied with the requirement of Rule 56(e) of the Federal Rules of Civil Procedure that he set forth specific facts showing that there is a genuine issue of fact for trial. This case presents no novel questions of law. The decision of the Third Circuit neither departs from the accepted and usual course of judicial proceedings nor does it sanction such a departure by the lower court to call for an exercise of this Court's power of supervision. The Court of Appeals' decision involves no important questions of federal law which

have not been, but should be, settled by this Court; nor does it decide a federal question in a way that conflicts with applicable decisions of this Court.

Houck has stated in his brief that the reason relied upon for allowance of his writ is that the decision of the Third Circuit conflicts with the decision of other federal courts of appeals. However, Houck has not cited a single decision from another court of appeals which is in conflict with the decision of the Third Circuit in this case.

Moreover, the decision of the Third Circuit was rendered in accordance with Rule 56(e). Houck's petition alleges nothing more than his disagreement with the decisions of both the lower courts that he has failed to set forth specific facts, supported by affidavits or depositions, showing that there is a genuine issue of material fact for trial. Houck's failure to produce evidence of such facts, and the findings of the lower courts that Houck failed to do so, do not establish any special or important reasons for the granting of the petition for writ of certiorari. Such issues are within the province of the lower courts, which fully and accurately addressed such issues. The granting of a writ of certiorari is not warranted merely to review the evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 546, 58 S. Ct. 851 (1938).

## II.

## HOUCK FAILED TO PRODUCE ANY EVIDENCE SHOWING THAT THERE IS A GENUINE ISSUE FOR TRIAL.

Rule 56(e) of the Federal Rules of Civil Procedure provides:

> When a motion for summary judgment is made and supported as provided in this rule, an

> adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Rule 56(e) does not allow a party resisting a motion for summary judgment to rely merely upon bare assertions, conclusionary allegations or suspicions. *Firemen's Insurance Company of Newark, N.J. v. DuFresne,* 676 F.2d 965 (3d Cir. 1982). "The burden is on the nonmoving party to search the record and detail the material controverting the moving party's position." *Schulz v. Celotex Corp.,* 942 F.2d 204, 210 (3d Cir. 1991). Furthermore, affidavits submitted under Rule 56(e) must be made on personal knowledge by showing that the affiant is competent to testify as to the matters contained in the affidavit. *Grier v. Galinac,* 745 F. Supp. 1058 (M.D. Pa. 1990).

Houck claims that the Third Circuit erred by accepting the respondents' facts and by making findings against him. Houck also claims that disputed issues of fact preclude summary judgment in this matter. However, as found by the courts below, Houck failed to identify any deposition testimony or produce competent and admissible evidence through his affidavit putting into dispute material issues of fact. Rather, Houck merely relies upon his bare suspicions and conclusionary allegations. The Third Circuit exercised plenary review of the record to determine whether there was any genuine issue of material fact and held that ". . . Houck has pointed to nothing in the record to support his allegation that his failure to receive a promotion was in any way related to his exercise of First Amendment freedoms. . . ."

The prime example of Houck's failure to produce any evidence disputing the facts produced by the respondents is Houck's claim that the changes to the promotion procedure were not approved by the FOP. The respondents produced competent evidence by Stephens and Assistant Police Chief Gerald Monahan ("Monahan"), both of whom were present at the meeting when the changes were made, that the FOP president and FOP solicitor agreed to the changes. Houck argues that such changes were not approved by the FOP. However, Houck was not present at the meeting nor did he produce any testimony by anyone at the meeting or from anyone from the FOP that the FOP did not agree to such changes. Houck merely relies upon his own unsupported suspicions for making such a claim. That is not sufficient to establish a genuine issue for trial.

Moreover, Houck did not produce any evidence that the changes in the promotion procedure were made in an effort to retaliate against him. Houck attempts to make this accusation by falsely stating several times that he (and possibly his brother, Thomas Houck) were the only police officers who passed the written examination portion of the promotion procedure. The fact is that under General Order 309 a passing grade on the written examination portion of the procedure was 70% or better. Houck received a grade of 66.89%. In an amazing sleight of hand, Houck adds five percentage points for seniority to his written test score to give him a 71.89% on the written test. However, seniority has nothing to do with the test score received on the written examination. It is a separate factor to be included in the overall evaluation process along with the oral interview and departmental evaluations. Under General Order 309 Houck, along with every other applicant, failed the written examination. This was the reason for the change in the promotion procedure, not any alleged effort to retaliate against Houck. Had General Order 309 not been changed, Houck would have been ineligible for promotion. Therefore, Houck cannot seriously claim that the promotion procedure was changed simply to retaliate against him.

Nor did the change in the departmental evaluation portion of the promotion procedure arise out of any motive to retaliate against Houck. The evidence is undisputed that the change originated from a complaint by the FOP that the applicants' immediate supervisors, who were originally to participate in the evaluation, did not have a uniform grading level, so that a person in one platoon might get an unfair advantage over a person in another platoon. It was in response to this complaint by the FOP that the departmental evaluation process was changed to provide greater uniformity in the evaluations. Although Houck questions the change in his brief, he produced no evidence to controvert the deposition testimony of Assistant Chief Monahan regarding the matter or purpose of the change in procedure. Furthermore, Houck offered no evidence to show that the modification was designed to facilitate Chief Stephens' ability to retaliate against Houck.

Houck incorrectly claims that the deposition testimony of Monahan is hearsay and may not be relied upon to establish the FOP's initiation of and consent to the changes in the promotion procedure. However, Monahan was present at the meeting and thus has first-hand knowledge of what occurred there. Monahan testified that the FOP president and FOP solicitor requested changes to the promotion procedure and consented to the changes that were made. That the FOP requested the changes, provided its reason for the request and consented to the changes are all relevant facts. Because the relevance of the statements by the FOP representatives is that they were uttered, not the truth of the matters asserted, Monahan's testimony about these statements is not hearsay.

On page 55 of his brief, Houck concedes that if the change in the departmental evaluation were made at the request of the FOP because the supervisors were using different standards to evaluate their patrolmen, then there was a legitimate business reason for the change. This is the exact evidence produced by the respondents

through the deposition testimony of Monahan. Monahan testified that at the meeting the FOP requested the change for the reason that the supervisors were using different evaluation standards. Houck has produced no evidence disputing these facts. Therefore, given his own admission, Houck cannot claim that the respondents made such changes to retaliate against him.

Moreover, nothing in the record supports Houck's assertion that one of the interviewers, Ms. Winters, was influenced by inaccurate information about the number of sick days taken by him. As the district court noted in refusing Houck's motion for reconsideration:

> Although the testimony showed that certain information about all the candidates were made available prior to the interview, including sick leave and workers compensation, there was no evidence offered to show, or from which it could be inferred, that this was done to direct prejudice at the plaintiff, or that the information was incorrect, or tainted, etc. Thus, we stated: "quite simply plaintiff has not pointed out any statement in Ms. Winters' deposition that she changed the score due to Chief Stephens' influence . . ." Plaintiff still has not brought to our attention any evidence to the contrary or to support his position that the oral interview was sabotaged.

Thus, as held by the courts below, Houck has failed to produce any evidence contradicting the facts established by the respondents, and he has failed to show a dispute as to issues of material fact. The respondents were therefore entitled to summary judgment. The courts below did not err in making such an award.

Finally, in his petition for writ of certiorari, Houck does not

allege that the Third Circuit erred in affirming the grant of summary judgment in favor of Mayor Joseph Daddona and the City of Allentown. Therefore, any such arguments must be deemed waived and may not be the proper subjects for review by this Court.

## CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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